S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARY MULLINS, Personal Representative of the Estate of NINA F. MULLINS, Deceased,

Plaintiff-Appellee,

v

ST. JOSEPH MERCY HOSPITAL, d/b/a ST. JOSEPH MERCY HEALTH SYSTEM, JASON WHITE, M.D., RAFAEL J. GROSSMAN, M.D., and KIMBERLY STEWART, M.D.,

Defendants-Appellants,

and

JAMES R. BENGSTON and WALTER WHITEHOUSE, M.D.,

Defendants.

FOR PUBLICATION
July 11, 2006
9:10 a.m.

No. 263210
Washtenaw Circuit Court
LC No. 03-000812-NH

Official Reported Version

Before: Hoekstra, P.J., and Murphy, White, Talbot, Meter, Cooper, and Donofrio, JJ.

COOPER, J. (*dissenting*).

This panel was convened to decide the issue raised in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586, 592; 711 NW2d 448 (2006), whether *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004), was correctly decided or was in error in holding that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), should be applied retroactively. The majority finds, without specifically considering the issues in *Ousley*, that *Waltz* is to be applied retroactively based on the precedential value of three peremptory orders from our Supreme Court directing retroactive application in three cases.[1] I disagree with the majority's analysis of the

[1] *Evans v Hallal*, 472 Mich 929 (2005); *Forsyth v Hopper*, 472 Mich 929 (2005); *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005).

precedential effect of peremptory orders and would find the three orders at issue do not require this Court to apply *Waltz* retroactively in other cases. Judge Murphy's dissent considers the issues in *Ousley* and *Waltz* and finds both incorrectly decided. I agree with that dissent, but write separately because I believe there are additional issues to be addressed.

The number and variety of opinions in this case suggest that we are not all really addressing the same question. What seems clear is that the way one frames the question all but dictates the answer. My question is whether retroactive application of *Waltz* supports the ends of fairness or certainty generally, or leads to just results for individual litigants. My answer is that it is patently unfair to retroactively apply a holding that deprives litigants of a day in court that they clearly had a right to before the holding was written, and that changing the rules in this fashion supports neither certainty nor fairness.

The first issue is the precedential effect, if any, of the Supreme Court's orders in *Evans*, *Forsyth*, and *Wyatt*. If, as the majority argues, those orders are binding precedent, then this Court would have no alternative to full retroactive application of *Waltz*. If they are not binding precedent, however, no matter how instructive they may be of the direction our Supreme Court would be likely to take should it agree to decide this issue, we are duty bound as constitutionally elected judges to consider the arguments and decide the case as we deem just and appropriate. We are not bound to follow where we guess the Court might go, and, indeed, we should write to urge the Supreme Court to consider the arguments we find relevant.

The Court denied leave to appeal in *Ousley* without comment. The lower courts may not reasonably read direction into a denial of leave, because none is given. Subsequently, the Court on one day issued three peremptory orders. Plainly the three peremptory orders state that this Court was to apply *Waltz* retroactively in those three cases, and those orders govern those specific cases. "Although the Supreme Court speaks through an order, its precedential effect is not clear. . . . Since the order responds to the particular need created, it may only govern the case presented." *People v Osteen*, 46 Mich App 409, 417; 208 NW2d 198 (1973).

Evans was disposed of in the Court of Appeals by denial of leave to appeal, and the Supreme Court's order remanded and directed the Court to consider "the question whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years *after* the original letters of authority and *before* the subsequent letters of authority were issued," and also to give *Waltz* "full retroactive application." *Evans*, *supra*. The order in *Wyatt* was identical. The order in *Forsyth* remanded without direction as to any specific question to be addressed, but did include direction as to *Waltz* retroactivity. In none of the three cases is there a published lower court opinion that recites the facts and circumstances of the case such that the bench, bar, and public could be on notice of what facts and circumstances would give rise to this peremptory treatment by the Supreme Court. Absent such context, the orders cannot be read to have application beyond the cases they specifically address.

The three orders lack the statement of reasons and facts required by the Michigan Constitution: "Decisions of the supreme court . . . shall contain a concise statement of the facts and reasons for each decision." Const 1963, art 6, § 6. Orders that do include such facts and reasoning have been held to be binding precedent. *People v Crall*, 444 Mich 463, 464 n 8; 510

NW2d 182 (1993); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001). The majority argues that the brief orders do contain sufficient facts and reasons for us to decipher what the Supreme Court meant and therefore have precedential value; it further argues that because the Supreme Court had surely read this Court's opinion in *Ousley* and had declined to disturb it, we should assume the retroactivity analysis in *Ousley* was correct. I disagree. The most that may be read into the three peremptory orders is the Supreme Court's disposition of those three specific cases.[2] And the most that can be read into the Supreme Court's denial of leave in *Ousley* is that the Court declined to decide the retroactivity issue at that time.

As constitutionally elected judges, we are required to follow precedent but not to prognosticate with regard to what the Supreme Court might do. In any case, trying to predict what the Court might do is a risky business. First, our Supreme Court has established that it does not feel particularly bound by the principle of stare decisis: "We must also recognize that stare decisis is a 'principle of policy' rather than 'an inexorable command,' and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). On the one hand, this justification for overruling precedent acknowledges that even poorly reasoned prior decisions do indeed "govern," and *Waltz*, overruling *Omelenchuk*, impliedly acknowledges the same—that *Omelenchuk* did indeed govern, confirming that it was settled law and that *Waltz* therefore merits prospective application only. On the other hand, it suggests that if we try to predict what the Court might do with *Mullins*, we might very well be wrong.

Second, in addition to reversing precedent set by prior Courts, the current Court has from time to time qualified or clarified its own recent rulings in subsequent decisions. Relevant to the core issue here, the Court openly acknowledged in *Waltz* that its words in *Omelenchuk* were "imprecise," *Waltz, supra* at 654, but that is not the only example of correction or clarification. For example, in *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), the Court readdressed the meaning of "lesser included offense," which it had spoken to just the year before in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In that pair of cases, there was sufficient confusion that the *Mendoza* majority expressly disagreed with the concurrence's "mischaracterization" of *Cornell*. *Mendoza, supra* at 533 n 5. With all due respect, if the justices of the Court cannot agree about what they said and meant, those of us not privy to their discussions ought not read more into their written words than is expressly there.

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[2] "[T]he precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 182-183; 99 S Ct 983; 59 L Ed 2d 230 (1979) (citations omitted). See also *Anderson v Celebrezze*, 460 US 780, 784; 103 S Ct 1564; 75 L Ed 2d 547 (1983).

Finally, attempting to predict what the Court might do is risky because in some areas there have been unpredictable decisions. After all, who would have predicted the anomalous outcome of *Bryant v Oakpointe Villa Nursing Ctr, Inc,* 471 Mich 411, 432; 684 NW2d 864 (2004), finding a claim time-barred, but allowing plaintiff to proceed because "[t]he equities of this case, however, compel a different result"?

Because I do not believe we should decide cases based on what we think the Supreme Court might or even probably would do, I would not give the three peremptory orders binding precedential effect.

The next issue then is whether *Ousley* was correctly decided, because if it was, then we would be bound to follow it. However, I agree with Judge Murphy's statement and his conclusion that it was incorrectly decided. Because I would find the *Ousley* Court was incorrect in concluding that *Waltz* did not decide an issue of first impression, the resolution of which was not clearly foreshadowed, I would find that *Waltz* should be applied prospectively only.

In Michigan, prospective application of binding decisions "is generally '"limited to decisions which overrule clear and uncontradicted case law."'" *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005) (citation omitted). We also apply prospectively only decisions that address "an issue of first impression whose resolution was not clearly foreshadowed." *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997) (citations and punctuation omitted). What these criteria have in common is a deference to twin concerns that sound in due process: fairness and fair notice. This at first glance appears to lead to a due process argument, but the right plaintiff is here deprived of does not rise to the level of the life, liberty, or property rights protected by the state and federal constitutions. Although not a violation of a constitutionally protected due process right, retroactivity in this case offends general expectations of the legal process:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [*Landgraf v USI Film Products*, 511 US 244, 265; 114 S Ct 1483; 128 L Ed 2d 229 (1994) (citation omitted).]

This Court in *Ousley* failed to consider the import of these due process concerns in determining that the state Supreme Court's decision in *Waltz* should be applied retroactively. The violation of accepted standards of fair notice was articulated by Judge O'Connell in his dissent in *McLean v McElhaney*, 269 Mich App 196, 207; 711 NW2d 775 (2005): "The finest legal augur with the keenest sight and all the birds in the autumn sky could not have anticipated *Waltz's* outcome with enough certainty to provide rudimentary counsel to a prospective client."

Omelenchuk was applied by courts and relied on by counsel for four years before the Supreme Court overruled it. The number of cases awaiting the outcome of the debate about retroactive application of *Waltz*, or already disposed of under the harsh dictates of *Ousley*, confirm that the bar indeed did not anticipate *Waltz's* outcome. To deprive these plaintiffs of their day in court creates the situation warned of in *Pohutski v City of Allen Park*, 465 Mich 675, 699; 641 NW2d 219 (2002), where the Court declined to apply its holding retroactively because if it did thus apply, plaintiffs in pending cases would "become a distinct class of litigants denied relief because of an unfortunate circumstance of timing." Plainly, retroactive application of *Waltz* violates any reasonable sense of fair notice, and it is patently unfair.

Our Supreme Court has listed three factors to be weighed when considering whether a case warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. *Pohutski, supra*, at 696. All three of these factors speak to fairness and the balancing of interests.

On one side of the balancing equation rests an interest in certainty and predictability in proceedings, and that interest plainly is impeded by allowing stale claims to proceed. See *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 285 n 12; 696 NW2d 646 (2005). But the claims at issue here are not stale claims plaintiffs are unfairly trying to revive with procedural trickery; they are claims that were valid when the plaintiffs started down their legal paths, following advice from their attorneys that was then entirely sound, but which now the courts are attempting to foreclose. Certainty and predictability are by no means served by a system that changes the rules in a way that changes the outcome midway through a claim. Retroactively applying a rule that limits a previously accepted filing time does more than create uncertainty: it affirmatively precludes claimants from timely filing even if their intended timeline comported with the law as it stood when they developed their legal strategies.

The *Waltz* Court reasoned that the clear and plain language of the tolling provision of § 5856 states that it applies only to statutes of limitation, so parties should not now be surprised that it does not apply to § 5852 since § 5852 is a saving statute. However, the *Waltz* majority had one interpretation of the interplay between the statutes, and the dissent had another. Justice Cavanagh's dissent in *Waltz* begins by asserting that the majority's holding "has the practical effect of shortening the period the Legislature expressly permits for bringing wrongful death actions." *Waltz, supra* at 655-656.

In light of the confusion, while awaiting clarification from the Legislature, the courts are best served by allowing parties to proceed by following the law as it existed when their claims accrued, which means applying *Waltz* prospectively only. To do otherwise would squarely favor the form over the substance of the affected parties' claims; fairness would be sacrificed entirely

to certainty, creating an imbalance that would doubtless have effects beyond the interests of the few plaintiffs still eligible to file if *Waltz* is not applied retroactively.[3]

What this case really boils down to is fundamental fairness, and because I find that it would be unfair to apply *Waltz* retroactively, I would resolve this conflict in favor of *Mullins* and against *Ousley*. Because the majority has reached a different conclusion, I add that courts bound by the precedent created by the majority today should consider equitable tolling as it was applied in *Mazumder v University of Michigan Bd of Regents*, 270 Mich App 42; 715 NW2d 96 (2006). The majority declines to reach this issue because the holding of *Mazumder* has been challenged and is being considered by a separate and distinct conflict panel, although the issues before that panel and the issues before this panel are plainly inextricably intertwined. *Ward v Siano*, 270 Mich App 584; 718 NW2d 371 (2006). I believe consideration of the equitable tolling issue is essential to full analysis of the conflict between *Ousley* and *Mullins*.

The role of the judiciary has always been to provide the citizenry with remedies that back up the rights granted them by the other branches of government. Revoking those remedies is antithetical to that purpose. When the law operates to revoke a remedy, as the majority asserts it does here, the courts must rely on other tools to ensure rights are protected. This Court in *Mazumder* did just that, applying equitable tolling to allow plaintiff to proceed with a claim that would otherwise be time barred. The Court explained that "[t]he doctrine of equitable or judicial tolling 'must and should be rarely invoked' only 'to ensure fundamental practicality and fairness and to prevent the unjust technical forfeiture of a cause of action . . . .'" *Mazumder, supra* at 61 (citation omitted). And the Court reasoned that the facts of the case merited this rare exercise of the equitable approach because "[p]laintiff 's failure to comply with the statute of limitations was the product of an understandable misinterpretation of the notice tolling provision, resulting from not only the appellate courts' interpretation of the statutes at issue, but also from the presumed legislative intent." *Id.* at 62.

We are presented with a similar situation here, where plaintiff 's failure to comply with the applicable limitations period was not only understandable but predictable, given the accepted state of the law when plaintiff 's claim accrued. This Court in *Ward*, *supra* at 601, cited Judge Hoekstra's dissent in *Mazumder*, arguing that equitable tolling is inappropriate because "'it cannot be said that plaintiff exercised reasonable diligence in the timely pursuit of her claim, in choosing to rely on *Omelenchuk* to afford the relevant statutes a broad interpretation not supported by the plain language of the statute . . . .'" But this argument turns on what "reasonable diligence" meant at the time in question, not retrospectively, after *Waltz* and *Ousley* were decided and plaintiffs were stuck with the choices they had made under an earlier state of the law. Plaintiffs who file anywhere inside the limitations period are reasonably diligent, and

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[3] Prospective application of *Waltz* will affect the time to file for plaintiffs whose claims did not accrue until after that decision, but at least it will not reach back in time and revoke causes of action upon which plaintiffs had every reason to rely.

these plaintiffs were working with a version of the limitations period that was only declared to be shorter after it was too late for them to file within the newly abbreviated period.

The courts retain equitable discretion to engage in a case by case inquiry that balances fairness and certainty for the parties, and such a case by case analysis will lead in some cases, as it should in this case, to equitable tolling as the appropriate remedy. This Court in *Mullins* reasoned that *Waltz* should not apply retroactively to deprive this plaintiff of a cause of action because "[t]he time limits provided in *Omelenchuk* reflected the current state of the law when the original personal representative, plaintiff's father, filed suit." *Mullins*, *supra* at 591. This plaintiff and others similarly situated should not be denied their day in court on the basis of a procedural rule that empties the substance from substantively sound claims. I would also ask the Legislature to speak more plainly as to its intent in the morass of statutes that govern plaintiffs' procedures for bringing wrongful death and medical malpractice claims, in order to undo the injustice done by retroactively applying *Waltz*.

I would resolve this conflict in favor of the majority in *Mullins*.

/s/ Jessica R. Cooper